

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1925.

No. 4396.

269

No. —, SPECIAL CALENDAR.

UNITED STATES OF AMERICA *EX REL.* L. MARGULIES &
SONS, INC., APPELLANT,

vs.

J. RAYMOND McCARL, COMPTROLLER GENERAL OF THE
UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED NOVEMBER 23, 1925.

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Court of Appeals of the District of Columbia.

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Court of Appeals of the District of Columbia.

No. 4396.

U. S. OF A. ex Rel. L. MARGULIES & SONS, INC., Appellant,

vs.

J. RAYMOND MCCARL, Comptroller General.

a Supreme Court of the District of Columbia.

At Law.

No. 69843.

UNITED STATES OF AMERICA ex Rel. L. MARGULIES & SONS, INC.,
Petitioner,

vs.

J. RAYMOND MCCARL, Comptroller General of the United States,
Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause to wit:

Petition for Writ of Mandamus.

Filed February 6, 1925.

In the Supreme Court of the District of Columbia.

At Law.

No. 69843.

UNITED STATES OF AMERICA ex Rel. L. MARGULIES & SONS, INC.,
Petitioner,

vs.

J. RAYMOND McCARL, Comptroller General of the United States,
Respondent.

The petition of the United States at the relation of L. Margulies & Sons, Inc., respectfully represents:

1. That the petitioner, L. Margulies & Sons, Inc., is a corporation, created and existing under the laws of the State of New York, and brings this petition for a writ of mandamus against the respondent, J. Raymond McCarl, a citizen of the United States residing in the District of Columbia, who is Comptroller General of the United States, duly appointed and qualified, and as such has control and direction of the establishment of the United States Government, known as the General Accounting Office, and he is sued in his official capacity.

2. That under the Act of June 10, 1921, 42 Stats. 24, it is the duty of the respondent to settle accounts against the United States and to issue and deliver vouchers therefor.

3. That on June 22, 1922 in settlement No. W-145965 the General Accounting Office found there was due the petitioner \$27,428.03 but it deducted therefrom \$7,773.75 which it thought had been erroneously paid to the claimant as a bonus under a former contract; on July 10, 1922, petitioner requested the respondent to review that finding, which he did, and determined that the \$7,773.75 was improperly charged and found that there was due the claimant the said sum of \$27,428.03 and issued a voucher therefor, but the said respondent has not delivered the said voucher, but has since refused to do so and is unlawfully withholding same, thus depriving petitioner of this amount of money since July 1922, which is not bearing interest and is a continuing and increasing heavy loss to the petitioner.

4. That in the meantime the War Department, without making any claim, had stated to the respondent that they might have a claim against the petitioner on other contracts, all of which other contracts were bonded by Surety Bonding companies, approved by the Government, which fully protected the Government on any amount that

might be found to be due the Government under the contracts; later the War Department filed a claim with the respondent against the petitioner for \$32,874.45 but did not furnish any proof and it did so after refusing to allow the petitioner to produce any proof in the War Department or to be heard in the War Department; thereupon the petitioner filed with the respondent on those contracts a claim it had against the Government for \$58,592.47, but the respondent then refused to hear or consider the proof on either the War Department claim for \$32,874.45 or the petitioner's claim for \$58,592.47 and refused to take jurisdiction and advised the petitioner to go back to the War Department and ask a hearing and introduction of proof; the respondent intimating that if he could take jurisdiction and go into the merits of the two claims, the indications were that he would find for the petitioner on the two claims.

5. The petitioner went back to the War Department and was again denied the right to a hearing or to offer proof, refuting the Government's pretended claim of \$32,874.45 and to establish the claimant's claim of \$54,592.47; thereupon the petitioner came back to the respondent and requested him to take jurisdiction of the two claims and settle same, but while waiting for him to determine whether or not he would take jurisdiction, as the Statute of Limitations against the petitioner's claim for \$58,592.47 was soon to become a bar to suit thereon, the petitioner made formal demand on the respondent for the delivery of the voucher for \$27,874.03 on October 14, 1924 and again on November 11, 1924; the respondent made no reply to the demand of October 14, 1924, but refused the demand of November 11, 1924 on November 21, 1924 and refused to take jurisdiction to settle the so-called Government claim of \$32,874.45 and the claim of the petitioner for \$58,592.47; that petitioner not having received a reply from the respondent to its demand of October 14, 1924, did on November 6, 1924 file suit against the United States in the Court of Claims, No. D-838 for \$69,767.47 with interest from December 1, 1918, being the said claim of \$58,592.47 and another claim of \$11,275.00, not connected in any way with matters it had before the respondent and petitioner denied the Government's right to claim the said \$32,874.45.

6. That the respondent having refused to take jurisdiction of the merits of the so-called Government claim for \$32,874.45 and the merits of the petitioner's claim for \$58,592.47 exceeded his authority and duty in withholding the voucher for \$27,428.03, which is not drawing interest and it is the respondent's duty under law to immediately deliver the voucher for \$27,428.03 to the petitioner.

7. On every contract that the petitioner had with the Government the petitioner furnished a good and sufficient bond, required by the Government, executed by a good and solvent bonding Company, examined and approved by the Treasury Department of the Government, as required by law, for the full protection of the Government on each specific contract; the Government having required the pe-

petitioner at a heavy expense to furnish surety bonds for the Government's protection cannot hold funds admittedly due the petitioner under one contract for some supposed claim under another well bonded contract, which claim has never been established by evidence and on which the Government has refused to give the petitioner a hearing or allow him to produce evidence; and on similar contracts with several hundred other contractors, the Government allowed the contractors to offset against the Government's pretended claim the \$58,592.47 just as the petitioner sought to offset against the Government's pretended claim of \$32,874.45, but in this sole instance, the Army officers refused to allow such a settlement and refused a hearing and introduction of testimony, and the respondent refused to take jurisdiction of the said claim and counterclaim, and not having taken jurisdiction of the claims on their merits, the respondent cannot hold other funds of the petitioner.

5 8. That the respondent has failed and refused, and still fails and refuses to deliver to the petitioner the vouchers for the said \$27,428.03.

Wherefore petitioner prays:

1. That a writ of mandamus may be issued, directing the respondent, J. Raymond McCarl, Comptroller General of the United States, to issue and deliver to the petitioner voucher for the said \$27,428.03 and to pay the said amount of \$27,428.03 to the petitioner, L. Margulies & Sons, Inc.

2. That a rule may issue, requiring the respondent, J. Raymond McCarl, Comptroller General of the United States, to show cause, if any he can, why the writ of mandamus should not issue herein as prayed.

L. MARGULIES & SONS, INC., [SEAL.]
By BERNARD MARGULIES.

RAYMOND M. HUDSON,
Attorney for Petitioner.

STATE OF NEW YORK,
County of New York, To wit:

I, Bernard Margulies, being first duly sworn, depose and state that I am treasurer of L. Margulies & Sons, Inc., and I am familiar with the facts set out in the foregoing petition and with contracts with the Government, and I am qualified and also authorized to make this affidavit; that the facts set out in the foregoing petition are true to the best of my knowledge, information and belief.

BERNARD MARGULIES.

6 Subscribed and sworn to before me by Bernard Margulies and given under my hand and official seal this 13th day of January, 1925.

[NOTARIAL SEAL.]

ABRAHAM BINDER,
Notary Public, New York County, #489.

Rule to Show Cause.

Filed February 6, 1925.

* * * * *

Upon consideration of the petition filed in the above-entitled case it is by the court this 6th day of February, 1925, ordered:

That the respondent, J. Raymond McCarl, Comptroller General of the United States, be, and he hereby is, required to show cause, if any he can, on or before the 20th day of February, 1925 at 10 o'clock a. m. why the writ of mandamus should not issue as in the petition prayed: Provided, That a copy of said petition and of this order be served upon said respondent on or before the 10th day of February, 1925.

WENDELL P. STAFFORD,
Justice.

7

Respondent's Answer to Petition.

Filed February 25, 1925.

* * * * *

J. Raymond McCarl, Comptroller General of the United States, respondent herein, now and at all times saving and reserving unto himself the benefit of all manner of objections and exceptions to the errors and insufficiencies to the petition filed herein and reserving unto himself the lack of jurisdiction of the court appearing on the face of the petition to grant relief prayed for and the lack of jurisdiction of the court to direct respondent as Comptroller General of the United States to perform the act or acts in question and relying on the same as if motion to dismiss had been specifically interposed, nevertheless answering so much and such parts of the petition and the rule to show cause as he admits it necessary for him to make answer thereto, says as follows:

1. The incorporation of petitioner is not known to respondent and is neither admitted or denied. Other averments of fact contained in paragraph 1 of the petition are in general admitted.

2. The averments contained in paragraph 2 of the petition are matters of statutory law and as such are admitted.

3. The averments of fact contained in paragraph 3 of the petition are admitted by respondent except as hereinafter denied, explained and qualified.

Respondent avers that on June 22, 1922, in settlement W-145965, the General Accounting Office found that there was due the
8 petitioner the sum of \$27,418.03 less the sums of \$7,773.75 and \$17,038.53, leaving the total amount due the petitioner \$2,615.75; that on July 10, 1922, petitioner requested review of settlement No. W-145965, dated June 22, 1922, allowing \$27,428.03 for articles delivered under contracts and deducting \$7,773.75 and

\$17,038.53, and submitted its claim in the sum of \$58,592.47; that pursuant to said request of the petitioner herein the General Accounting Office took jurisdiction of and duly considered the various claims of petitioner against the United States under contracts Numbers 2307, dated October 29, 1917; 3325 dated February 4, 1918; 3396 dated February 16, 1918; 3283, dated July 14, 1918; 4326, dated March 13, 1918; 4325, dated March 14, 1918; 2440, dated April 26, 1918; 4343, dated July 3, 1918; and 5404, dated August 14, 1918; including the alleged claim in the sum of \$58,592.47, and gave full consideration to all facts submitted; and by decision dated November 1, 1923, respondent found and determined that there was a balance due the United States from the petitioner in the sum of \$7,117.92, a copy of which decision is attached to this paragraph of respondent's answer and made a part hereof and marked Exhibit "A" for the respondent; that by reason of said decision being adverse to petitioner, there was and is nothing due petitioner arising out of transactions with the Government of the United States, under the above enumerated contracts.

4. Respondent denies any official information or knowledge sufficient to justify an opinion or belief as to the truth of statements alleged to have been made by the representatives of the War Department, but admits that all contracts between petitioner and
9 respondent were bonded by surety companies.

Respondent admits that on September 7, 1923, petitioner filed with the General Accounting Office a claim against the United States amounting to \$58,592.47.

Respondent denies that he refused to take jurisdiction of this alleged claim and avers that the General Accounting Office, under the control and direction of respondent as Comptroller General of the United States, did take jurisdiction of said claim submitted by petitioner and did settle and adjust the same and on November 1, 1923, forwarded to petitioner the decision rendered in said matter.

5. Respondent denies any knowledge or official information sufficient to justify an admission or denial of the allegations of the petitioner that it was denied the right of rehearing or of offering proof in support of its said claim before the War Department but admits that on December 29, 1923, petitioner requested reconsideration of review of settlement No. W-145965 and on May 10, 1922, the respondent advised petitioner by letter that there appeared no reason for reaching a conclusion other than that stated in decision of November 1, 1923, and under date of June 2, 1924, a certificate of settlement was issued showing petitioner to be indebted to the United States in the sum of \$7,117.92 and forwarded the same to petitioner at 23 Washington Place, Brooklyn, N. Y.

Respondent admits that petitioner made demand on respondent as Comptroller General of the United States for the delivery of the voucher for \$27,874.03 and avers that under date of November 21,
10 1924, respondent as Comptroller General of the United States notified petitioner by letter stating that all balances due petitioner from the United States had been set off against the in-

debtedness of petitioner to the United States, leaving a balance of \$7,117.92 due from petitioner to the United States; that a copy of said letter is filed herewith, made a part of this paragraph of respondent's answer and marked exhibit "B."

Respondent denies that at no time did respondent as Comptroller General of the United States, or the General Accounting Office refuse to take jurisdiction of petitioner's alleged claim against the United States and avers that pursuant to the provisions of section 236 of the Revised Statutes as amended by the act of June 10, 1921, respondent as Comptroller General of the United States did take jurisdiction of petitioner's said claim and did settle and adjust the same as shown by decision rendered under date of November 1, 1923, and that said action is final in so far as respondent as Comptroller General of the United States, and the General Accounting Office are concerned.

6. Respondent denies that he as Comptroller General of the United States or the General Accounting Office ever at any time refused to take jurisdiction of the Government's claim for \$32,874.45 or of petitioner's claim for \$58,592.47 and denies petitioner's conclusion of law that the Comptroller General of the United States exceeded his authority and duty in withholding a voucher for \$27,428.03.

7. Respondent admits that on every contract that the petitioner had with the Government, the petitioner furnished a bond but denies petitioner's conclusion of law wherein petitioner states
11 that respondent as Comptroller General of the United States acted without authority of law in withholding from petitioner a sum of money due petitioner under one contract that it had with the Government and off-setting the same against moneys due the Government from petitioner under other contracts that petitioner had with the Government.

Respondent avers that the United States possessed the general right to apply all sums due from the United States to claimant to the extinguishment of any balances due and owing to the United States on other contracts; that under section 236 of the Revised Statutes as amended by the act of June 10, 1921, all claims and demands whatever by the Government of the United States and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Officer and that in the settlement and adjustment of claims and demands by the Government of the United States or against it the General Accounting Office under the control and direction of respondent as Comptroller General of the United States had authority to set off an amount due from the United States to claimant against an amount due the United States from claimant, and respondent further avers that in so acting there was protected the interest of all parties concerned, as well that of the United States as of the sureties on the bonds accompanying the contracts between the United States and petitioner, leaving the petitioner his right to proceed in such forum wherein the United States has consented to be sued as a debtor.

8. The averments of fact contained in paragraph 8 of the petition are admitted.

12 Further answering the petition the respondent avers that under section 236 of the Revised Statutes as amended by the act of June 10, 1921, the General Accounting Office has jurisdiction to settle and adjust all claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned either as debtor or creditor, except in special instances where the Congress of the United States has conferred jurisdiction upon some other tribunal to settle and adjust certain classes of claims, and that under said section of the Revised Statutes the General Accounting Office had jurisdiction to audit all accounts by and between the Government of the United States and the petitioner herein arising out of and under contracts entered into by the petitioner and the Government of the United States, hereinbefore enumerated, and to settle and adjust all claims and demands of every kind, character and description by the Government of the United States or against it, and that in exercising the jurisdiction conferred on the General Accounting Office, respondent herein as Comptroller General of the United States, who is the official head of and has control of the General Accounting Office, acted in a quasi-judicial capacity and had the authority to exercise discretion in settling and adjusting said claims.

J. RAYMOND McCARL.

JNO. M. LEWIS,
*Counsel for the Comptroller
General of the United States.*

PEYTON GORDON,
United States Attorney;
VERNON E. WEST,
Attorneys for Respondent.

13 DISTRICT OF COLUMBIA, ss:

I, J. Raymond McCarl, having first been duly sworn on oath, depose and say: That I have read the foregoing answer and know the contents thereof, and that the matters and things therein stated, I verily believe to be true.

J. RAYMOND McCARL.

Sworn and subscribed to before me, this 25th day of February, 1925.

[NOTARIAL SEAL.]

S. B. TULLOSS,
Notary Public.

EXHIBIT "A."

Copy.

Comptroller General of the United States,
Washington.

Review No. 2394.

November 1, 1923.

L. Margulies & Sons, Inc., requested July 10, 1922, review of settlement No. W-145965, dated June 22, 1922, allowing \$27,428.03, for articles delivered under contract No. 5454-N dated August 14, 1918, and in payment of percentages withheld pending completion of the contract but deducting \$7,773.75, paid by Captain Thomas H. Lynch, on voucher No. 3970, August 1918, accounts, as a bonus for savings effected under contract No. 2307, dated October 29, 1917, and \$17,038.53, as the value of material furnished by the United States for the manufacture of clothing under certain contracts hereinafter mentioned, and not accounted for either in manufactured articles, scrap or otherwise.

At the contractor's request the War Department re-audited the property accounts and consideration of the request for review has been held in abeyance pending completion of the re-audit. In the meantime a voucher for \$944.25, stated in favor of the contractor for articles delivered has been forwarded to this office. The re-audit resulted in increasing the charge for property not accounted for to \$32,874.45 and the contractor submits a claim for an alleged gross saving of \$58,592.47, or a net saving of \$25,618.02. In other words, it is admitted that the contractor is entitled to \$28,372.28, consisting of \$27,428.03, allowed in the settlement under review and \$944.25 for material subsequently delivered but the contractor denies liability for \$7,773.75 deducted as a bonus previously paid and for \$32,874.45 as the value of material not accounted for and asserts that it is entitled to \$25,618.02, as saving in material effected. The items of the claim in dispute will be considered in the order stated.

Contract No. 2307, dated October 29, 1917, required the manufacture of 180,000 wool breeches at \$.84 each. The United States was required to furnish necessary olive drab melton, silesia, and white drilling and it was provided that:

"All rags or clippings from cloth furnished by the Government for the manufacture of clothing and equipage shall remain the property of the United States, to be accumulated, packed in bags, or baled, and held for such disposition as may be directed by the Government.

15 "In cutting textile materials furnished by the United States for use in the manufacture of garments, etc., under this contract the contractor shall use best efforts to avoid all possible waste.

For the additional work and special care so involved, the contractor shall be paid, as separate compensation, and premium, an amount equal to twenty per cent of the net cost price of such Government owned textile materials to the extent of the saving in uncut yardage on comparing the qualities actually used in the cutting with the allowances for the purpose listed in the accompanying schedules—the material of the yardage so saved to remain the property of the United States. There shall not, however, be any skimping whatever in the cutting for the garments, etc., and in the event of the violation of this condition no compensation shall be made for the saving in yardage resulting from the lays of such skimmed cuttings, and the Government shall also have the election of annulling the contract for such cause.

“The contractor shall be held liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps, from any cause whatsoever, while in his possession.”

Captain Thomas H. Lynch, August 15, 1918, paid the contractor \$7,773.75, as 20% of the net cost of material saved from the regulation allowance and credit therefor was denied in the audit of his accounts on the ground that the stipulation in the contract was invalid because general principles of law imposed on the contractor the duty of conserving the material furnished and especially so when the United States was engaged in the world war and there was great need of clothing material for the Army.

In 27 Comp. Dec., 898, wherein is considered the question of the legality of the payment of a bonus under a contract for the manufacture of overcoats from materials furnished by the Government, which contract contained a bonus provision almost identical with the provision in the instant contract, it was held that the contractor, having effected a saving in accordance with the contract
16 was entitled to the compensation provided in the contract therefor. See also decisions dated August 19, 1921, in the matter of Reinburg and Greenburg and November 17, 1921, in the matter of Schmitz and Schroeder Clothing Company. The charge of \$7,773.75, deducted in the settlement on account of bonus paid for saving of material will be removed.

There remains for consideration the claim of the United States for \$32,874.45, as the value of material not accounted for and the claim of the contractor for \$58,592.47, as the value of material saved in operations under the various contracts. As hereinbefore stated, upon re-audit of the property accounts the charge was increased from \$17,038.53 to \$32,874.45, itemized as follows:

Contract number.	Date.	Charge.
2307.	October 29, 1917.....	\$2,717.49
3283.	July 14, 1918.....	26.64
3325.	February 4, 1918.....	439.44
3396.	February 16, 1918.....	83.82
4326.	March 13, 1918.....	11,851.12
4325.	March 14, 1918.....	366.52
2440.	April 26, 1918.....	205.03
4343.	July 3, 1918.....	895.99
5454.	August 14, 1918.....	16,288.40
		\$32,874.45

None of the contracts contained a provision for payment to the contractor of a bonus for the saving of cloth and all required the coats and breeches to be manufactured in accordance with certain specifications thereto attached and contained provisions similar to the following:

“All rags or clippings from cloth furnished by the Government for the manufacture of this clothing shall remain the property of the United States, to be accumulated, packed in bags, or baled, and held for such disposition as may be directed by the Government.

17 “The contractor shall be liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps, from any cause whatsoever, while in his possession.”

The material to be furnished by the Government consisted of olive drab melton, cotton drilling, and olive drab silesia. The War Department after checking the number of manufactured articles and the number of pounds of clippings delivered by the contractor to the United States against the number of yards of cloth delivered to the contractor found that there was a shortage of material of the value of \$32,874.45, as above itemized. The contractor in letter dated June 30, 1923, stated:

“We are prepared to accept the Government’s statement as to the materials issued to us for this contract (No. 5454, August 14, 1918) and other prior contracts, and also the statement as to the garments delivered and goods transferred and returned.”

“While we agree with this report as a matter of bookkeeping we wish to be distinctly understood that we do not concur in the view that we are liable to the Government in respect to overuse of materials used in the performance of these contracts.”

The contractor contends that instead of being indebted to the United States for \$32,874.45, it effected a saving in material of the value of \$58,592.47, and that even admitting responsibility for \$32,874.45 material not accounted for there is a balance due it of \$25,618.02. Argument in support of the contention is made by the contractor as follows:

“This claim of \$58,592.47, is for savings made by the claimant on contracts with the Government being for amounts of goods allowed by the Government to the claimant on its contracts but unused and which were returned to the Government although the claimant was entitled to retain same and the claimant is therefore entitled to recover for the value of the goods so returned to the Government as the claimant, under the contracts, was entitled to this amount of goods to go into the garments which were manufactured by it under the contract. An itemized statement of the savings is filed
18 herewith as exhibit ‘A’ as part of this claim.”

* * * * *

“When goods and materials were delivered under one contract, there being several others in process of manufacture, the goods were used partly under other contracts at the direction and with the knowledge and consent of the different army officers in charge of the contracts as the main object was to have delivered the manufactured garments as quickly as possible and the indiscriminate use of material under one contract on other contracts was not only permitted but required by the Government officers.”

The contentions of claimant were investigated by the proper officers of the War Department whose certificate by the act of March 29, 1894, 28 Stat., 47, and the act of August 29, 1916, 39 Stat., 635, in the matter of property account, is conclusive in so far as accountability and responsibility for the material is concerned. See *United States v. De Perow*. 208 Fed. 895. Furthermore, it is to be observed that none of these contracts authorized retention by the contractor of any of the clippings, etc., and all imposed liability for failure to account either in the form of finished product, scrap, or otherwise, for all of the material furnished by the United States. While the allowance for the breeches and coats may have been liberal, the fact that the contractor was able to manufacture them under some of the contracts out of less than the authorized allowance of melton, silesia, or cotton duck, it was not authorized to retain the difference between such authorized allowance and the yardage actually used. The claim for allowance by reason of alleged saving must be denied and the charge of \$32,874.45 by reason of failure to account for material must stand.

The contractor was entitled to \$28,372.28, of which \$2,615.75 was paid on settlement No. 145965 leaving a credit of \$25,-
19 756.53 to be applied to its indebtedness of \$32,874.45, a balance of \$7,117.92 is certified due the United States and should be remitted to this office at once.

J. R. McCARL,
Comptroller General.

EXHIBIT "B."

Comptroller General of the United States,
Washington.

In re Review No. 2394.

Nov. 21, 1924.

L. Margulies & Sons, Inc.,
c/o Raymond M. Hudson, Attorney,
305 Continental Trust Bldg.,
Washington, D. C.

SIRS:

There has been received your letters dated September 23, 1924, and November 11, 1924, in reference to decision of this office dated November 1, 1923, wherein it was shown that you were indebted to the United States in the sum of \$7,117.92.

After the date of the decision an oral hearing was granted to your attorney, Mr. Raymond M. Hudson and he was informed that no different conclusion could be reached in the matter on the facts before this office. He contended that the War Department had not correctly reported the facts and his contentions in detail were referred by this office to the War Department with the results stated in office letter of May 10, 1924. There is nothing in your letter of September 23, 1924, to authorize or warrant reconsideration of the matter by this office, and especially so since the matter is stated to be now pending in the Court of Claims. The action heretofore taken is sustained.

You request in your letter of November 11, 1924, delivery of certain vouchers and in reply thereto you are advised that all
20 balances due you have been set off against your indebtedness to the United States, leaving a balance of \$7,117.92 due from you to the Government.

Respectfully,
(Signed)

J. R. McCARL,
Comptroller General.

Copy.

Plea or Traverse of Petitioner.

Filed April 6, 1925.

* * * * *

Now comes the petitioner and for plea or traverse to the answer of the respondent filed herein says:

1. That the allegations of the respondent in the several paragraphs of his answer alleging that the respondent took jurisdiction of the said so-called claim of the Government for \$32,874.45 and offset of the petitioner for \$58,592.47 is a statement of a mere conclusion of law and not a statement of a fact, but such statements if construed to be a statement of fact are incorrect and not true, as the respondent

did not take jurisdiction to consider, settle, adjust or decide on the merits either the said so-called claim of the Government or the offset of the petitioner, but respondent merely considered the certificate that the War Department filed, setting up the Government's so-called claim of \$32,874.45, to determine or decide in the respondent's opinion whether or not he had authority and jurisdiction to go back of the said certificate and determine the facts and merits of the said so-called claim of the Government and the offset of the petitioner,

and the said respondent on such consideration decided, and
21 only decided, that the respondent was bound by the said certificate and could not go back of it and could not go into the merits or facts of the said so-called claim of the Government or offset of the petitioner; that the proper construction of the decision of the respondent filed with his answer shows that this is all that the respondent did decide and intended to decide and the other statements in the said decision were merely by way of an history or statement of the transactions and was not a decision of same or of any matter by the respondent other than that he could not go back of the said certificate of the War Department, but was bound by same; that on many occasions prior and subsequent to the said decision of November 1, 1923 the respondent refused after urgent requests of petitioner to go into the merits, fact, and evidence in reference to the said so-called claim of the Government and the petitioner's offset, and stated repeatedly that respondent was bound by the said certificate, but the respondent on these various occasions prior and subsequent to said decision of November 1, 1923 stated that if the petitioner would go back to the War Department and get it to withdraw its certificate and to send over the evidence and all papers and documents without a certificate binding on the respondent that the respondent could and would then take jurisdiction of the said so-called claim of the Government and the petitioner's offset and give it a hearing and settle, decide and adjust same on the merits; that being so advised by the respondent this petitioner both prior and subsequent to the said decision of November 1, 1923 made numerous appeals to the

22 War Department to send over the evidence, papers, and documents without a certificate, leaving the questions open for the respondent to examine into and determine, but this the War Department failed and refused to do, but insisted on its certificate being sent, which was accordingly sent to the respondent; respondent and petitioner always understood and construed the decision of November 1, 1923 to be merely that respondent was bound by the certificate of the War Department and could not go behind same or into the merits and the Exhibit "B" to the respondent's answer, being the letter of November 21, 1924 where it states "that no different conclusion could be reached in the matter on the facts before this office," the respondent meant, as he had often personally told petitioner, that the facts before the office was the certificate of the War Department, by which respondent was bound; that after petitioner wrote respondent with an affidavit on December 29, 1924 urging respondent to go into the merits, respondent referred the matter back to the War Department and petitioner urged the War Department to send over

the evidence and not the certificate, but the War Department refused to change its certificate and reported back to the respondent on January 6, 1924, still insisting on its certificate and sending its certificate, and the respondent on May 10, 1924 notified the petitioner that the War Department had so reported and that respondent was bound by the said certificate of the War Department and could not go into the merits of the so-called claim of the Government and the offset of the petitioner.

2. This petitioner denies respondent had authority or was
23 justified in withholding the vouchers and money of the petitioner to protect the Surety Companies or to protect the United States. It denies that the respondent withheld same to protect either the Surety Company or the United States, but alleges that the respondent withheld same because by his decision he was bound by the certificate of the War Department, and could not go into the merits of the case and could not act otherwise than he did act.

RAYMOND M. HUDSON,
Attorney for Petitioner.

Demurrer to Plea or Traverse.

Filed April 6, 1925.

* * * * *

Now comes the respondent, J. Raymond McCarl, Comptroller General of the United States, and says that the plea or traverse to the answer herein is bad in substance.

PEYTON GORDON,
United States Attorney;
JNO. M. LEWIS,
Counsel for the Comptroller General,
Attorneys for Respondent.

Note.

Among the points of law to be argued in support of the foregoing demurrer, are the following:

1. That the said plea or traverse admits that the respondent rendered a decision on November 1st, 1925, a copy of which said decision is annexed to the answer herein as "Exhibit A",
24 which said decision speaks for itself and in which said decision the respondent took jurisdiction and decided all matters arising out of the petitioner's claim against the Government of the United States and out of the claim by the United States against the petitioner.

2. That in the matter of property accounts, the certificate issued by the War Department is conclusive upon the General Accounting Office, in so far as accountability and responsibility for the material mentioned therein is concerned.

3. That the respondent in determining that the certificate of the War Department referred to in said plea or traverse, was binding upon him as to the indebtedness of the petitioner to the United States, was acting within the judgment and discretion reposed in him by law, which said judgment and discretion cannot be reviewed in this proceeding.

4. That the petition does not state facts sufficient to constitute a cause of action against respondent in this case.

5. That there is no duty imposed by law upon the respondent to issue vouchers in any case.

6. That respondent has no authority to pay money out of the Treasury of the United States in any case.

25 Supreme Court of the District of Columbia.

Monday, April 6th, 1925.

Session resumed pursuant to adjournment, present presiding Mr Justice Stafford.

* * * * *

Upon consideration of the demurrer filed herein to the plea or traverse, it is ordered that said demurrer be and the same is hereby sustained with leave to amend petition within ten days.

Amendment.

Filed July 24, 1925.

* * * * *

Now comes the petitioner, and, leave of court being first had and obtained, amends its petition for writ of mandamus filed herein by striking out the prayers thereof and inserting in lieu thereof the following:

1. That a writ of mandamus may be issued, directing the respondent, J. Raymond McCarl, Comptroller General of the United States:

(a) To issue and deliver to the petitioner voucher for the said \$27,428.03 and to pay the said amount of \$27,428.03 to the petitioner, L. Margulies & Sons, Inc.; and/or

(b) To issue and deliver to petitioner or to direct, require and authorize the issuance and delivering to petitioner of such proper vouchers, checks or warrants, as will enable petitioner to obtain and receive in due course, without delay, payment of said \$27,428.03; and/or

(c) To issue and deliver to petitioner or to direct, require and authorize the issuance and delivering to petitioner of such proper vouchers, checks or warrants, as will enable petitioner to obtain and receive in due course, without delay, payment of said \$27,428.03,

just as he would have done had not the War Department stated it had a claim against petitioner and then sent its certificate.

2. That a rule may issue, requiring the respondent, J. Raymond McCarl, Comptroller General of the United States, to show cause, if any he can, why the writ of mandamus should not issue herein as prayed.

RAYMOND M. HUDSON,
Attorney for Petitioner.

Stipulation.

Filed July 24, 1925.

* * * * *

It is stipulated by and between counsel for the respective parties hereto that the answer and demurrer thereto, plea or traverse, and demurrer to said plea or traverse shall stand and be considered as pleadings upon the petition as amended.

RAYMOND M. HUDSON,
Attorney for Petitioner.

JNO. M. LEWIS,
*Counsel for the Comptroller Gen-
eral of the United States;*

PEYTON GORDON,
United States Attorney;

VERNON E. WEST,
*Assistant United States Attorney,
Attorneys for Respondent.*

27 Supreme Court of the District of Columbia.

Friday July 24th, 1925.

Session resumed pursuant to adjournment, present presiding Mr. Justice Siddons.

* * * * *

Stafford, J.

This cause came on to be heard upon the petition, the rule to show cause, the answer to said rule, and petition, the reply to said answer and the demurrer to said reply, and after argument by the respective attorneys of record was submitted to the Court. Whereupon, the same being considered, it is ordered that the said demurrer be, and the same hereby is, sustained, and the said petition adjudged insufficient and dismissed and the rule to show cause discharged, thereupon the relator by his attorney elects to stand upon his said reply. Wherefore, it is considered and ordered that relator take nothing by this action, that respondent go hence without day, be for nothing held, and recover of relator his cost of defense to

3. That the respondent in determining that the certificate of the War Department referred to in said plea or traverse, was binding upon him as to the indebtedness of the petitioner to the United States, was acting within the judgment and discretion reposed in him by law, which said judgment and discretion cannot be reviewed in this proceeding.

4. That the petition does not state facts sufficient to constitute a cause of action against respondent in this case.

5. That there is no duty imposed by law upon the respondent to issue vouchers in any case.

6. That respondent has no authority to pay money out of the Treasury of the United States in any case.

25 Supreme Court of the District of Columbia.

Monday, April 6th, 1925.

Session resumed pursuant to adjournment, present presiding Mr Justice Stafford.

* * * * *

Upon consideration of the demurrer filed herein to the plea or traverse, it is ordered that said demurrer be and the same is hereby sustained with leave to amend petition within ten days.

Amendment.

Filed July 24, 1925.

* * * * *

Now comes the petitioner, and, leave of court being first had and obtained, amends its petition for writ of mandamus filed herein by striking out the prayers thereof and inserting in lieu thereof the following:

1. That a writ of mandamus may be issued, directing the respondent, J. Raymond McCarl, Comptroller General of the United States:

(a) To issue and deliver to the petitioner voucher for the said \$27,428.03 and to pay the said amount of \$27,428.03 to the petitioner, L. Margulies & Sons, Inc.; and/or

(b) To issue and deliver to petitioner or to direct, require and authorize the issuance and delivering to petitioner of such proper vouchers, checks or warrants, as will enable petitioner to obtain and receive in due course, without delay, payment of said \$27,428.03; and/or

(c) To issue and deliver to petitioner or to direct, require and authorize the issuance and delivering to petitioner of such proper vouchers, checks or warrants, as will enable petitioner to obtain and receive in due course, without delay, payment of said \$27,428.03,

just as he would have done had not the War Department stated it had a claim against petitioner and then sent its certificate.

2. That a rule may issue, requiring the respondent, J. Raymond McCarl, Comptroller General of the United States, to show cause, if any he can, why the writ of mandamus should not issue herein as prayed.

RAYMOND M. HUDSON,
Attorney for Petitioner.

Stipulation.

Filed July 24, 1925.

* * * * *

It is stipulated by and between counsel for the respective parties hereto that the answer and demurrer thereto, plea or traverse, and demurrer to said plea or traverse shall stand and be considered as pleadings upon the petition as amended.

RAYMOND M. HUDSON,
Attorney for Petitioner.

JNO. M. LEWIS,
*Counsel for the Comptroller Gen-
eral of the United States;*

PEYTON GORDON,
United States Attorney;

VERNON E. WEST,
*Assistant United States Attorney,
Attorneys for Respondent.*

27 Supreme Court of the District of Columbia.

Friday July 24th, 1925.

Session resumed pursuant to adjournment, present presiding Mr. Justice Siddons.

* * * * *

Stafford, J.

This cause came on to be heard upon the petition, the rule to show cause, the answer to said rule, and petition, the reply to said answer and the demurrer to said reply, and after argument by the respective attorneys of record was submitted to the Court. Whereupon, the same being considered, it is ordered that the said demurrer be, and the same hereby is, sustained, and the said petition adjudged insufficient and dismissed and the rule to show cause discharged, thereupon the relator by his attorney elects to stand upon his said reply. Wherefore, it is considered and ordered that relator take nothing by this action, that respondent go hence without day, be for nothing held, and recover of relator his cost of defense to

be taxed by the Clerk and have execution thereof. From the foregoing judgment the relator by his attorney, in open Court notes an appeal to the Court of Appeals, whereupon the maximum of an undertaking for costs is hereby fixed in the sum of \$100.00, with leave to deposit the sum of \$50.00 with the Clerk in lieu thereof.

28

Memorandum.

August 17, 1925.—\$50.00 deposited by Pl'ff's Att'y in lieu of appeal bond.

Assignments of Error.

Filed September 4, 1925.

* * * * *

Now comes the petitioner and makes and files the following assignments of error:

1. The Court erred in denying the Writ of Mandamus.
2. The Court erred in failing to hold that the Comptroller General is not bound by the certificate of the War Department set up by him in this action.
3. The Court erred in holding where the respondent had not taken jurisdiction of a so-called offset of the United States, that a mandamus would not lie to compel respondent to deliver voucher for, and have paid, petitioner's claim for which voucher had been issued.
4. It was error for the Court where voucher had been issued for petitioner and Government through the War Department had sent in a certificate of a so-called counterclaim without hearings in the War Department, and the petitioner had sued the Government in the Court of Claims under the contracts under which the Government's so-called counterclaim arose for a larger amount than the so-called counterclaim, to hold that a mandamus would not *like* to make respondent issue and deliver the voucher, and have paid, or pay, same.
5. Where respondent has settled a claim and issued a
29 voucher for petitioner under any bonded contract he cannot offset against same an unsettled or un-investigated so-called counterclaim under other and different duly bonded contracts, nor can he withhold payment of same for years while some other Government Department is investigating the said so-called counterclaim.
6. Where respondent files an opinion, on a so-called counterclaim of the Government presented by a certificate of the War Department, stating the history of same and then holding that said certificate is binding and conclusive on respondent so that he cannot go into the merits of the so-called counterclaim and adjust and settle it, it cannot be held by the Court that respondent took jurisdiction of the so-called counterclaim to adjust and settle it, and not having taken jurisdic-

tion he cannot withhold payment of an admitted amount due petitioner, for which voucher has been issued but not delivered.

RAYMOND M. HUDSON,
Attorney for Petitioner.

Designation of Record.

Filed September 4, 1925.

* * * * *

Now comes the petitioner and, through the Clerk, asks the Court in making up the transcript of the record on appeal to include in same the following papers and documents:

1. Petition and Rule.
2. The Amendment to the Petition.
- 30 3. Answer to Amended Petition.
4. Traverse to Answer Petition.
5. Demurrer to Traverse.
6. Stipulation of Counsel.
7. Orders of April 6, and July 24.
8. Assignments of Error.
9. Designation of Record.

RAYMOND M. HUDSON,
Attorney for Petitioner.

To Peyton Gordon, Esq.,
District Attorney;
O. R. McGuire, Esq.:

Take notice that on September 12, 1925 I will apply to the Clerk of the Supreme Court of the District of Columbia for the transcript of the record in the above action, according to the foregoing designation of record.

RAYMOND M. HUDSON,
Attorney for Petitioner.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 30, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 69843 at Law, wherein United States of America, *ex rel.* L. Margulies & Sons, Inc., is Petitioner and J. Raymond McCarl, Comptroller General of the United States, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of November, 1925.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 4396. U. S. of A. ex rel. L. Margulies & Sons, Inc., appellant, *vs.* J. Raymond McCarl, Comptroller General, &c. Court of Appeals, District of Columbia. Filed Nov. 23, 1925. Henry W. Hodges, clerk.

(8727)

In the Court of Appeals for the District of Columbia

January Term, 1926.

No. 4396.

UNITED STATES OF AMERICA *ex rel.* L. MAR-
GULIES & SONS, INC.,
Appellant,

vs.

J. RAYMOND M. McCARL, Comptroller General of
the United States,
Appellee.

Appeal from Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

RAYMOND M. HUDSON,
Attorney for Appellant,
Washington, D. C.

LEWIS K. TORBET,
Of Counsel,
Chicago, Ill.

**IN THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *ex*
rel. L. MARGULIES & SONS, Inc.,
Appellant,

vs.

J. RAYMOND MCCARL, Comptroller
General of the United States,
Appellee.

No. 4396.

STATEMENT OF THE CASE.

This is an appeal from the Supreme Court of the District of Columbia, sustaining the appellee's demurrer to a traverse and denying a mandamus against the appellee.

The appellee issued a voucher for \$27,428.03 on June 22, 1922, for the appellant after reinstating an item of \$7,773.75, deducted by an auditor, but the appellee did not deliver the voucher to the appellant and has prevented appellant receiving payment thereof and this admitted amount is still due the appellant and is not bearing interest.

After this voucher had been issued the War Department notified the appellee that it might have a claim on other contracts against the appellant and, after nearly a year, it sent over different certificates stating at different times, different amounts that were due the Government, the last amount claimed being \$32,874.45 on various contracts which had thereto been settled between the appellant and the War Department and

other Government departments, and each of which contracts was duly bonded to the Government by a licensed surety company.

The petition shows and it is not denied that the War Department refused any hearings on these different items and refused to send over the evidence, and the appellee notified the appellant several times that he could not go into the merits of the said item constituting the \$32,874.45 unless the War Department sent over the evidence and not the certificate.

The appellee had a claim against the Government under these contracts other than the one for which the voucher was issued and in excess thereof, amounting to \$58,592.40, which appellant asked the appellee to offset against the said \$32,874.45 and to go into the evidence of both and determine the issue. Later, the War Department not being willing to send over the evidence or to allow a hearing, but insisting on its certificate, the appellee rendered an opinion reciting the history, and then without adjusting or settling the claims, decided in reference to the items of the claim and the certificate that they "were investigated by the proper officers of the War Department whose certificate by the Act of March 29, 1894, 28 Stat. 47, and the Act of August 29, 1916, 39 Stat. 635, in the matter of property account is conclusive in so far as accountability and responsibility for the material is concerned."

After this opinion the matter was taken up a number of times with the appellee and he again advised that the appellant get the War Department to send over the evidence and that the appellee would go into the merits of the case and adjust the account and that he had no jurisdiction or authority to do so so long as there was only a certificate from the War Department and not the evidence.

The appellant having an entirely different claim for

\$11,275, under an entirely separate contract from any of the seven or eight contracts covering the above items, brought suit in the Court of Claims against the Government, as the Statute of Limitations was about to run, and in this suit the appellant set up his claim for \$58,592.47, and stated that the Government was pretending to have a claim for \$32,874.45, but the appellant denied that the Government was entitled to such claim.

This suit took these three matters entirely out of the jurisdiction of the appellee or the departments and thus left before the appellee, only the said voucher for \$27,428.03, which was not disputed.

Thereafter, the appellant made demand on the appellee, for the delivery and payment of the said voucher, which was refused. Whereupon, this action for a mandamus was instituted in the Supreme Court of the District of Columbia, a petition was filed and answered, to which the appellant demurred, which was overruled, and a traverse was filed and stricken out. Thereupon, by a stipulation an amendment to the petition was filed, which broadened the prayer, and all other pleadings were to be treated as amended pleadings to the amended petition, which resulted in the demurrer to the traverse being sustained and the action dismissed.

POINT I.

The amount of the voucher being undisputed and admittedly due, a mandamus will lie to make the appellee deliver and pay same.

There is sufficient authority for the writ to require payment in Section 307 of the Act of June 10, 1921, which is as follows:

“The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office, through disbursing officers of the several departments and establishments, instead of by warrant,”

and also in Section 305 of same act:

“Section 236 of the Revised Statutes is amended to read as follows:

“Sec. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.”

POINT II.

The certificate of the War Department under a contract with a private citizen is not conclusive or binding on the appellee and he could have taken jurisdiction on the merits of the claim for \$58,592.47 of the appellant.

As the appellee did not take jurisdiction of the Government's so-called claim and appellant's offset on their merits, but decided erroneously as a ministerial act that he had no authority to do so, as the War Department certificate was binding and conclusive on appellee, the mandamus as prayed in the amended petition will clearly lie, as jurisdiction of the so-called Government claim and appellant's offset has now been taken by the Court of Claims and it is now beyond the appellee's jurisdiction, and was when this action was instituted.

The statutes appellee relies upon are as follows:

“Compl. Stat., Sec. 1951: System of accountability for quartermaster's supplies—The

Quartermaster General, under the direction of the Secretary of War, shall prescribe and enforce a system of accountability for all quartermaster's supplies to the army or to officers, seamen, and marines. And he shall account to the Secretary of War at least once in three months for all property and money that may pass through his hands, or the hands of his subordinate officers (R. S., Sec. 1139, amended Feb. 27, 1877, c. 69, Sec. 1, 19 Stat. 242)."

"Compl. Stat., Sec. 1951a: Accounting for army supplies—Hereafter the accounting for army supplies or property and the fixing of responsibility therefor shall be according to such regulations as may be prescribed by the Secretary of War (Aug. 29, 1916, c. 418, Sec. 1, 39 Stat. 635)."

"Compl. Stat., Sec. 1498: Transcripts from books of treasury; suits against delinquents—When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the department or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the Court, trying the cause, shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: Provided that where suit is brought

upon a bond or other sealed instrument, and the defendant pleads '*non est factum*,' or makes his motion to the Court, verifying such plea or motion by his oath, the Court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit" (R. S., Sec. 886).

The last act is quoted in *United States vs. DuPerow*, 208 Fed. 895, and cited in appellee's opinion of November 1, 1923.

In the same opinion, it is stated that the certificate of the War Department, after such investigation, "is conclusive" and cites *U. S. vs. DuPerow*, 208 Fed. 895, in support of such statement, but this is incorrect as Judge Killits specifically decided that a certificate of the Treasury Department, under that citation, was *prima facie* and did not hold that it was conclusive and in no constitutional statute could it be made conclusive because it would be allowing officers to make a statement that could never be questioned and the officers could not be cross-examined as to how they reached the conclusion. Judge Killits said (p. 898) :

"It is not the theory of the Government as we understand it that the Auditor's charge is conclusive; it is so neither as to identify the articles charged nor as to values; defendant may dispute in both respects. Not only the nature of the business but because of the application of Section 886, the Auditor's charge established a *prima facie* case in both respects; the Government must charge the officer with some value, and that of the cost to the Government or that when issued is the convenient and proper statement. Knowledge thereafter of the deterioration of value through use or otherwise is peculiarly with the officer in possession."

This statement of Judge Killits specifically grants what we asked the War Department and the Comp-

troller General for, but they would not consider it and the Comptroller General evidently did not consider it as he took the position that the War Department certificate prohibited him from doing so. Clearly his action in this respect is illegal. Counsel asks that the Court carefully read the full opinion of Judge Killits.

In *Mellon vs. Orinoco Co.*, 45 Sup. Ct. 53 at 54; 266 U. S., Chief Justice Taft said:

“It is contended, on behalf of the Secretary of the Treasury, that his duty, in this regard, is entirely ministerial, that he must carry out the behest of the Secretary of State, who is charged by law with determining, who the proper claimants are, and therefore that after the decision of the Secretary of State, no Court may interfere between the payment by the Secretary of the Treasury to the claimant found to be entitled. We consider this question to be already settled by the decision of this Court against the Government contention.”

When the above case was formerly before the United States Supreme Court in another proceeding (*LeCrone vs. McAdoo*, 253 U. S. 217; 40 Sup. Ct. 510 at 511), the Court said:

“It is thought that Congress hardly can have sought to confer judicial powers upon the Secretary of State” (*U. S. vs. Borchering*, 188 U. S. 223; 22 Sup. Ct. 607).

Likewise, the reasons are stronger that Congress did not confer such power upon the Secretary of War, in a matter of this character.

Appellee fails to distinguish, or to see the distinction between construing a statute as to whether he (the officer) has authority, or jurisdiction to determine a matter or case on its merits, or whether he (the officer) is bound by the certificate of the War Department, and a decision of the case or matter, after hearing evidence, on the merits.

Here the appellee only decided he had no jurisdiction or authority to go back of the certificate and decide the merits. This was purely a ministerial act and not an exercise of discretion.

Where an officer construes a statute to determine his jurisdiction or authority, it is merely a ministerial act and not an exercise of discretion (*Smith vs. Jackson*, 246 U. S. 388, 38 Sup. Ct. 353; *Loisel vs. Mortimer*, 277 Fed. 283, C. C. A.).

POINT III.

The appellee has no authority to offset a so-called unliquidated claim of the Government under a duly bonded contract or contracts against an admitted and liquidated claim of a citizen under an entirely different bonded contract.

Appellee relies on the case of *Barry vs. United States*, 229 U. S. 47; 33 Sup. Ct. 681, which is not, in any way, applicable to these vouchers that we are demanding, as in that case there was really only one contract, it being for the delivery of the Wallsend coal and claimant not being able to deliver all of that kind of coal sold the Government other coal under a specific article of the contract, providing that where all of one quantity cannot be furnished, the Government can buy other coal, and the Government's offset there was for the difference in the price of the two coals.

Consequently, it is clear that there was only one contract, and the method and kind of delivery being changed by a specific article of the contract. There is nothing in the case to indicate that there had been a demand for payment under one contract before there

was any setting up of the claim of another by the Government.

Appellee has no authority to withhold payment of a concededly due, just and liquidated non-interest bearing claim under a duly bonded contract to be offset by an unliquidated (and also disputed) claim of the Government under another and entirely separate duly bonded contract, which latter claim if the Government establishes it would carry interest for the Government.

POINT IV.

Where numerous separate bonded contracts between citizens and the Government have been settled by the departments, the Government cannot thereafter set up an unliquidated claim under such contracts against an admitted and liquidated claim due a citizen under a separate and distinct bonded contract and withhold the payment of same for several years without interest.

This proposition has been recently decided in a full and complete opinion in the *Standard Steel Car Company vs. United States*, 59 Ct. Cls. (May 7, 1925).

The seven or eight contracts under which the items were taken to make up the \$32,874.45 had been settled on the same policy that the Government had settled over three hundred and fifty similar contracts with as many contractors, and had established a policy for the Government to thus settle its contracts, which policy is binding on the Government, as held by the Court of Claims in *A. T. & S. Fe R. R. Co. vs. United States*, 59 Ct. Cls.

The appellee contends that it would have to offset one claim under the bonded contract against another

claim under another bonded contract to protect the surety, thus reversing the order as Congress required bonds to protect the Government and not to protect the sureties, as the sureties were paid by the contractor to protect the Government. While the Government assigns this as a reason, the true reason is that the Government wants to withhold money several years from a contractor without interest to offset against the claim on which, if the Government could establish its claim (which it cannot do here), it would receive interest and in the present case amounting to a loss of several thousand dollars to the appellant and double gain to the Government.

It seems very clear that the mandamus should issue.

Wherefore, the appellant urges that the judgment be reversed with costs and sent back with instructions to issue the mandamus as prayed.

Respectfully submitted,

RAYMOND M. HUDSON,
Attorney for Appellant.

LEWIS K. TORBET,
Of Counsel.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JAN 6 - 1926

Henry M. Dodge
CLERK

No. 4396

**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1925

UNITED STATES OF AMERICA EX REL. L. MARGULIES
& SONS, INC., APPELLANT

v.

J. RAYMOND McCARL, COMPTROLLER GENERAL OF
THE UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

PEYTON GORDON,
United States Attorney.

R. L. GOLZÉ,
O. R. McGUIRE,
Attorneys for Appellee.

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(I)

In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1925

No. 4396

UNITED STATES OF AMERICA, EX REL. L. MARGULIES
& Sons, Inc., appellant

v.

J. RAYMOND McCARL, COMPTROLLER GENERAL OF
the United States, appellee

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The pleadings

The appellant, L. Margulies & Sons, Inc., filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus against the appellee to require him to deliver to the appellant a voucher for \$27,428.03 and to pay from the Treasury of the United States said sum. (R. 2, 4.) The appellee averred in answer to the petition that in decision dated November 1, 1923, which was attached to the answer as Exhibit A, he took jurisdiction of and fully considered the various claims

of the appellant against the United States and the various claims of the United States against the appellant; that he offset said claims against each other; and that pursuant to section 305 of the Budget and Accounting Act of June 10, 1921, 42 Stat. 24, he certified a balance of \$7,117.92 due from appellant to the United States. (R. 5, 8.) The appellant filed a demurrer to the answer, which was overruled, and the appellant joined issue. Appellee moved to strike out the joinder of issue because the appellant did not plead to or traverse all or any of the material averments in the answer. The lower court sustained the motion to strike, and appellant filed a plea or traverse to the answer, and the appellee demurred to the traverse which the court also sustained (R. 15, 16), with leave to the appellant to amend its petition. The petition was amended (R. 16, 17), and counsel stipulated that the answer and the plea or traverse and the demurrer thereto should stand and be considered as pleading upon the petition as amended (R. 17), and the court again sustained the demurrer (R. 17), from which appellant has prosecuted this appeal.

The facts

The appellant proceeds to give its version of the controversy. Responsive to this statement, it should also be observed that appellee's answer is also a part of the record and that the facts averred in the answer not traversed by appellant are to be considered as true. As appellant's version of the

facts before the court is based upon its theory of the case, it would seem necessary that appellee's conception of what the uncontradicted pleadings show should also be stated.

By settlement No. W-145965, dated June 22, 1922, the General Accounting Office, under the appellee, found that there was due the appellant the sum of \$27,428.03 less the sums of \$7,773.75 and \$17,038.53 due the United States, or a net sum of \$2,615.75. On July 10, 1922, appellant requested review of said settlement and submitted a claim for \$58,592.47. The appellee took jurisdiction of and duly considered the various claims of the appellant under contracts dated October 29, 1917, February 4, 1918, February 16, 1918, March 13, 1918, March 14, 1918, April 26, 1918, July 3, 1918, July 14, 1918, and August 14, 1918, including the aforesaid claim of \$58,592.47 and reached the conclusion in decision dated November 1, 1923, that there was a balance of \$7,117.92 due from appellant to the United States instead of \$2,615.75 due appellant as stated in the settlement of June 22, 1922. A copy of the decision of November 1, 1923, is printed in the Record, pp. 9-12. An oral hearing was thereafter granted counsel for appellant and in letter dated November 21, 1924, which is also printed in the Record, p. 13, the appellant was informed that on the facts then before the appellee no different conclusion could be reached than that it was indebted to the United States in the sum of \$7,117.92, and that this was particu-

larly true since suit in the matter had been brought by appellant in the Court of Claims.

The petition filed shortly thereafter in the Supreme Court of the District of Columbia prayed for a writ of mandamus to require appellee to deliver to appellant a voucher for \$27,428.03 and to pay same from the Treasury of the United States irrespective of the Government's set-off. The demurrer of appellee to the traverse was sustained because the court concluded it did not have jurisdiction to grant the relief prayed. The amended petition prayed for the identical relief and the court again sustained the demurrer because it fell within the principles of *United States ex rel. Carroll Electric Company v. McCarl*, which it had recently decided and which decision was sustained by this court in opinion dated November 2, 1925, 53 W. L. R. 809. See also *Mississippi v. Durham*, 4 Mackey, (D. C.), 235; *United States v. Lynch*, 137 U. S. 280; *Work v. Rives*, 267 U. S. 175.

ARGUMENT

I

The pleadings show issues of fact and questions of law to be involved which can not be tried out or even reviewed on an application for a writ of mandamus

The court held in its opinion and judgment of November 2, 1925, in *United States of America ex rel. Carroll Electric Company v. McCarl*, 53 W. L. R. 809, that a writ of mandamus could not be converted into a writ of error to review the decisions

of appellee as Comptroller General of the United States involving issues of law and fact arising out of contracts between the United States and private corporations, etc. Such conclusion is in accord with a long line of decisions including *Brashear v. Mason*, 4 Howard, 92, cited in the opinion, and *Decatur v. Paulding*, 14 Peters, 497; *United States v. Lynch*, 137 U. S. 280; *United States ex rel. West v. Hitchcock*, 205 U. S. 80; and *Work v. Rives*, 267 U. S. 165. See also *Lambs v. Phipps*, 22 Philippine Reports, 456.

Appellant contends that the appellee erred in his decision of November 1, 1923, in holding that the certificate of the Secretary of War under the acts of March 29, 1894, 28 Stat. 47, and August 29, 1916, 39 Stat. 635, as to the shortage of property was conclusive; but even if it could be established that appellee did err in said decision, the error could not be corrected in a mandamus proceeding. The appellee had jurisdiction under section 236, Revised Statutes, as amended by the act of June 10, 1921, 42 Stat. 24, to audit and settle both the claim of the appellant against the United States and of the United States against appellant. It was stated by the Supreme Court of the United States in *West v. Hitchcock*, *supra*, at pages 85 and 86, where it was contended that an error had been made in decision of a question committed by law to the Secretary of the Interior that—

* * * If the Secretary had authority to pass on the relator's right to select land,

his jurisdiction did not depend upon his decision being right. By alleging that he had denied the application he did not invoke the revision of his reasons by a court, even when he saw fit to add the date. He raised no question of law but simply stood on his authority and put forward his decision as final. As we have implied, such an answer affirms not merely the past but the present determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to the court any statement of those grounds purporting to be exhaustive and complete, and the court can not make an inquisition into his mental processes to see whether they were correct. See *DeCambra v. Rogers*, 189 U. S. 119, 122.

This language of the Supreme Court of the United States is peculiarly apropos here, for appellee was not required to state in his decision of November 1, 1923, all of the reasons which impelled him to conclude that appellant was indebted to the United States in the sum of \$7,117.92, nor is it necessary that the reason stated in said decision be legally unquestionable. This question was also settled in *United States v. Lynch*, supra, where a writ of mandamus was sought against the former Auditor for the War Department and the Comptroller of the Treasury, and the court said, at page 286, that—

The contention of the relator is that the interpretation he puts upon the act is too obviously correct to admit of dispute, and that this court has so decided; but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority.

Moreover, it is to be noted that a balance certified by the appellee to be due the United States establishes *prima facie* the indebtedness in the courts. *Soule v. United States*, 100 U. S. 8; *United States v. Pierson*, 145 Fed. 814; *United States v. Drachman*, 43 Pacific, 222; *Dennis v. United States*, 52 Pacific, 353.

The foregoing disposes of the points raised in the brief for appellant, but it may be stated more directly in reply thereto that it was not admitted in appellee's decision of November 1, 1923, or in the

answer, that there was any sum due the appellant. On the contrary, it was held in said decision and averred in the answer that appellant was indebted to the United States. That the United States has the right of set-off and that it is the legal duty of appellee to make set-offs in the settlement and adjustment of claims for and against the United States has been recognized by the decisions of courts in many cases, including *Gratiot v. United States*, 15 Peters 336; *Wisconsin Central Railroad Company v. United States*, 164 U. S. 190; *Barry v. United States*, 229 U. S. 47; and *Taggart v. United States*, 17 Ct. Cls. 322. The court said in the *Wisconsin Railroad case* that when a proper officer of the United States concludes that:

* * * money has been paid without authority of law and he has money of the same claimant in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold it subject to the decision of the court when the claimant sues. *United States v. Carr*, 132 U. S. 644; *Gratiot v. United States*, 15 Peters 366; *Steele v. United States*, *United States v. Burchard*, *United States v. Stahl*, *supra*. And in this way multiplicity of suits and circuitry of action are avoided.

and in the *Taggart case* the court said that:

Where a person is both debtor and creditor of the United States, in any form, the officers of the Treasury Department (now the Comptroller General) in settling the ac-

counts, not only have the power, but are required in the proper discharge of their duties, to set off the one indebtedness against the other, and to allow and certify for payment only the balance found due on one side or the other. Section 1766 of the Revised Statutes so provides, and special provisions on the subject, to meet the case of judgments recovered against the United States, "or other claim duly allowed by legal authority," are made by the Act of March 3, 1875, ch. 149 (1 Supplmt. to R. S., p. 185). But the right of set-off in such cases exists independently of those special enactments and is founded upon what is now section 236 of the Revised Statutes, as follows:

"Sec. 236. All claims and demands whatever, by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury."

The duty of the accounting officers in matters of set-off has frequently been recognized by the courts. (*McKnight's Case*, 13 C. Cls. R., 306, affirmed on appeal: *Bonnafon's Case*, 14 C. Cls. R., 489.)

The learned counsel for appellant appears to be in error in his statement, point IV, page 9 of his brief, that the Court of Claims decided in *Standard Steel Car Company v. United States*, May 7, 1925, that the United States could not set off a sum payable under one contract against sums due the Government under other contracts. The point decided in said

case was that a Dent Act of March 2, 1919, 40 Stat. 1272, award in settlement of a contract could not be reopened in the absence of fraud on the Government.

II

The relator has an adequate remedy at law by suit in the Court of Claims

A writ of mandamus never issues unless the petitioner has exhausted all other adequate remedies. As was said by the Supreme Court of the United States in *Bayard v. United States ex rel. White*, 127 U. S. 246:

The writ of mandamus is a remedy to compel the performance of a duty required by law where the party seeking relief has no other legal remedy and the duty sought to be enforced is clear and indisputable. *Knox County v. Aspinwall*, 24 How. 377-383. Both requisites must concur in every case.

In the case of *Crozier v. Krupp*, 224 U. S. 290, an action had been brought to restrain an officer of the Government from infringing a patent, but pending appeal, a statute had been passed providing that suit could be maintained against the United States in the Court of Claims for its infringement. The court held on appeal that the bill of complaint must be dismissed because there was an adequate remedy at law. See also *United States ex rel. Hall v. Payne*, 48 App. D. C. 279, where this court held that a writ of mandamus will be denied when “there is an adequate remedy without re-

sorting to an application for a writ of mandamus.” The court also said in *Lochren v. Long*, 6 App. D. C. 486–506 that, “ Even where the right to the writ [of mandamus] is otherwise clear, still, it will not issue where there is another plain, legal remedy,” and in *United States v. Lynch, supra*, which, as hereinbefore stated, was a proceeding by mandamus against the Auditor for the War Department and the Comptroller of the Treasury, the predecessors of the Comptroller General of the United States, the court denied the writ and said, page 287, that:

Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case.

The opinion of this court, dated November 2, 1925, in the *Carroll Electric Case* that the relator was not entitled to a writ of mandamus against appellee because settlement of claims arising out of contracts with the United States involves the exercise of judgment and discretion and because there exists a plain and adequate remedy at law is in entire harmony with the foregoing decisions, indisputably settling the law on these points and requires that there be affirmed the judgment of the court below dismissing the application for a writ of mandamus.

CONCLUSION

Upon the whole case it is submitted that the judgment below dismissing the petition for a writ of mandamus was proper and should be affirmed with costs.

Respectfully,

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